94-465

No. 94-___

OCT 6 1994
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

IRVING C. AND JEANETTE E. STEVENS,
Petitioners,

v.

PETER W. STOTT, L. John Harrington, James F. Wells, Kathryn E. Kendall, Josephine W. Hatfield, Walter T. Williamson, III, Judith A. Garling, William A. Jack and Evelyn J. Jack, as Trustees of the William A. Jack Family Trust, Susan U. Rick, John M. Ulrich, Warren J. Ulrich, Jr., and Jocelyn U. Groom, as Trustee of the Separate property Trust of Jocelyn U. Groom,
Respondents.

On Writ of Certiorari To The
Oregon Court of Appeals
Of The State of Oregon

RESPONDENTS' BRIEF OPPOSING CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions stated by Petitioners are not presented for review. This is discussed below.

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Accepted.

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RESPONDENTS' BRIEF OPPOSING CERTIORARI

OPINIONS BELOW

Accepted.

STATEMENT OF JURISDICTION

Respondents do not accept Petitioners' Statement of Jurisdiction. They have not demonstrated any way in which 28 USC Section 1257(a), under which they claim, is implicated by the decision below. The validity of no treaty or statute of the United States has been questioned. No state statute has been questioned under federal law. No right, privilege or immunity has been claimed under the laws of the United States. The issue decided by the Oregon Court of Appeals was how to construe a plat map. 28 USC Section 1257(a) does not apply.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents do not accept Petitioners' statement of Constitutional Provisions and Statutes Involved.

No issue is presented involving the Fourteenth Amendment of the United States Constitution. Petitioners have not alleged and do not assert that the state has taken anything from them. The only state action in this case is the adjudication of private ownership rights between private individuals.

No violation of the Oregon Admission Act, 11 Stat 383 (1859) is alleged or asserted. Petitioners do not claim that the State of Oregon interfered with the primary disposal of the soil within Oregon by the United States or with any congressional act for securing title in said soil to anybody. It is undisputed that the United States disposed of this soil by patent in about 1889.

Respondents have failed to demonstrate any way in

which the Oregon legislature's acceptance of the federal offer of statehood in 1859 is involved.

Petitioners have not shown that any of these provisions were pleaded or relied upon in the state court.

STATEMENT OF THE CASE

Accepted, except for the following:

1. We accept the first sentence describing the Respondents' Complaint, but do not accept the characterization in the second sentence of respondents' argument. It was Respondents' position throughout this case that the Petitioners owned nothing.

2. We do not accept the inclusion of or the reference to Appendix G. Neither Appendix F nor Appendix G to the petition appear in the record of this case. The purpose of appending the exhibits is unclear from the petition, but we wish to avoid any misunderstanding based upon these documents.

3. We do not accept Petitioners' characterization of

the holding of the Oregon Court of Appeals. It speaks for itself.

RESPONSE TO REASONS FOR GRANTING THE WRIT

Summary

The federal question asserted by petitioners is not presented by this case. The dispositive issue is a garden variety state law interpretation of a 1910 plat map, applying rules of construction derived from Oregon caselaw to the specific evidence in this record.

Discussion

Petitioners strain unsuccessfully to find a federal question upon which to base their pursuit of certiorari. The only question before the Oregon courts, however, was a factual issue of whether the plat map reproduced below was intended to grant to the ocean or, as petitioners contended, that the original grantors intended to reserve a strip between the lots and the ocean. The Oregon Court of

Appeals, applying rules of construction derived from Oregon caselaw to the specific evidence of the case, found as a matter of fact, not law, de novo on appeal[1] that the original grantors intended to grant to the ocean.

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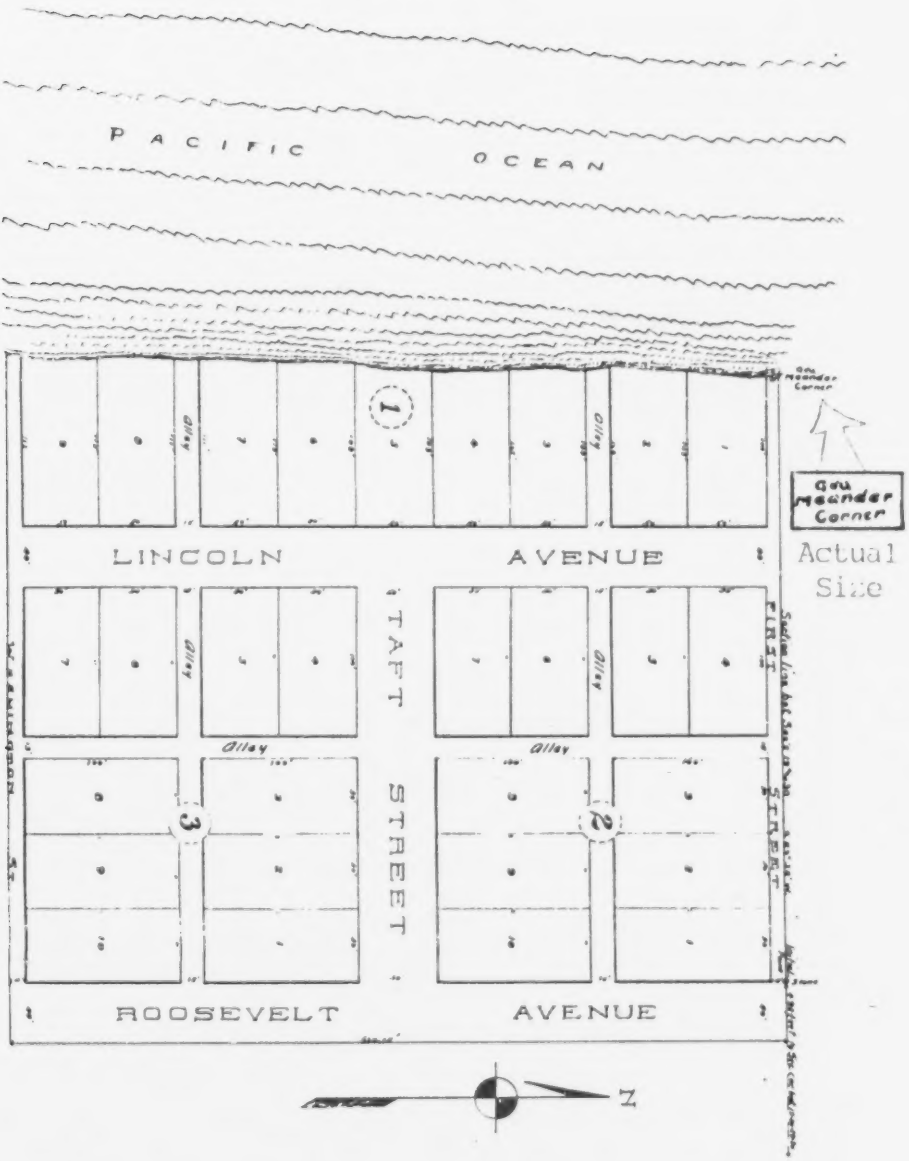
[1]Oregon grants its appellate courts authority to decide facts anew on the record in equity cases. This appeal was governed by Oregon Revised Statutes 19.125(3) which provides:

> "Upon an appeal from a decree in a suit in equity, the Court of Appeals shall try the cause anew upon the record."



(Detail from Exhibit 2)

This factual finding not only involves no federal question, it involves no doctrinal question.

It is true that the Court of Appeals stated that in 1910, oceanside owners claiming from federal grants believed they owned to the high water mark. This factual assumption was consistent with, if not invited by, the Petitioners' statement in their trial brief that:

> "Prior to 1935, title to property abutting the Pacific Ocean ran to the high water mark. Shively v. Bowlby, 152 US 1, 14." (Defendants' Trial Brief, page 3; original emphasis)

Now, seeking certiorari and still citing Shively v. Bowlby, Petitioners argue that the lower court erred in assuming that owners in 1910 believed their ownership extended to the high water mark. Having asserted that very proposition to the trial court, petitioners should not be heard now to assert the contrary proposition.

The challenged statement is tangential. The critical fact in the case is the appearance of the government

meander corner in the plat map. The dispositive reasoning of the court is based on the existence of that meander corner:

> "A meander line in a description indicates that the water itself is the true boundary. *Seabrook v. Coos Bay Ice Co.* 49 Or 237, 89 P 417 (1907). Therefore, a grant to the meander line is presumed to be a grant to the water. *Morse Bros., Inc. v. Wallace*, 78 Or App 138, 140 2, 714 P2d 1095, rev den 301 Or 165 (1986). Moreover, even if a description in a plat is ambiguous, there is a policy against construing conveyances so as to create strips of land, the title to which would remain in abeyance for lengthy periods. *Nelson v. Vandemarr*, 281 Or 65, 68, 573 P2d 1232 (1978).
>
> "We apply those rules to the evidence in this case." See opinion at Petition for Certiorari A-7.

Thus, the dispositive fact in this case is that the plat map says "GOV MEANDER CORNER" at the northwest corner of the plat[2] and the Oregon court made findings based on

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[2] The term is hard to read in this reduced reproduction, but the original is more legible and all pertinent testimony and judicial reasoning was based on this reading of the notation. We do not believe this to be a disputed point.

that fact which displease Petitioners. Because this is not even arguably a federal issue, Petitioners have ignored it, choosing instead to rely upon a passing observation, not essential to the decision, to satisfy the certiorari requirement of a federal question. In truth, however, Petitioners' asserted issue was not a premise of the lower court decision. Indeed, it is *obiter dictum*. It is doubtful that this case presents it for review.

Petitioners' search for significance beyond this case is attenuated, to say the least. They attack collaterally two earlier Oregon decisions with which they express great dissatisfaction, and imply that certiorari in this case would straighten out the prior cases. They come to this concern a little late. Certiorari was denied in one of the prior cases[3]

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[3] Stevens v. City of Cannon Beach, 114 Or App 457, 835 P2d (1991), 317 Or 131, 854 P2d 449 (1993) cert den __ US ____, 114 S Ct 1332, 127 LEd2d 679.

and not sought in the other.[4]

Petitioners give no reason why certiorari is more warranted in this collateral attack than it was at the time the disliked cases were decided.

Petitioners also argue that this court should review this case because they fear that the statement regarding pre-1935 ownership might someday be used as a premise by other courts. Petitioners' concern that courts of other seaboard states will make decisions similar to Oregon's earlier cases is not only premature, but they probably

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[4] State ex rel v. Thornton v. Hay, 254 Or 584, 462 P2d 671 (1969) (public has a right to use dry sand area under common law doctrine of custom). In this decision, the Oregon Supreme Court expressly disclaimed reliance upon the difference between the extreme high-tide line and the high water mark, ruling only as to the land between the water and the vegetation line under Oregon law.

Petitioner's complaint that this decision under Oregon real property law constitutes a "windfall to the State of Oregon," Petition 15, sounds hollow. The record shows that Petitioners sought out descendants of the ancient platters, including the Beckers, and purchased quitclaim deeds for token payments. They now claim to own a sizable portion of the northern Oregon coast. Apparently, they prefer that the windfall, if any, belong to them rather than to the public.

overestimate the precedential heft of this state law factual decision from the Oregon Court of Appeals. All in good time. If and when another court relies on the same assumption as a dispositive matter of law, the aggrieved litigants of that case can seek certiorari in the context of its specific record and rulings and this court can assess the issue on the merits of the case in which it is presented. It seems much more likely, however, that state courts will decide their quiet title cases based on state law real property grounds, just as the Oregon courts did.

CONCLUSION

Petitioners seek review of a nondispositive statement of fact which they themselves asserted in the trial court, in a factual case decided under state law. There is

no basis for certiorari. The petition should be denied.

DATED October 3, 1994.

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